

EXPLANATORY STATEMENT

Issued by the Assistant Minister for Home Affairs and Parliamentary Secretary to the
Minister for Home Affairs

Customs Act 1901

Customs (International Obligations) Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Regulations 2018

The *Customs Act 1901* (the Act) concerns customs related functions and is the legislative authority that sets out the customs requirements for the importation, and exportation, of goods to and from Australia.

Subsection 270(1) of the Act provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters, which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for giving effect to the Act.

Subsection 163(1) of the Act provides that refunds, rebates and remissions of duty may be made:

- (a) in respect of goods generally or in respect of the goods included in a class of goods; and
- (b) in such circumstances as are prescribed, being circumstances that relate to goods generally or to the goods included in the class of goods.

The *Customs Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Act 2018* (the PACER Plus Implementation Act) amends the Act to fulfil Australia's obligations under Chapter 3 of the *Pacific Agreement on Closer Economic Relations Plus* (the PACER Plus), which deals with rules of origin. These rules determine whether goods imported into Australia from a Party to the PACER Plus are 'Pacific Islands originating goods' and are thereby eligible for preferential rates of customs duty. 'Pacific Islands originating goods' are goods imported from the territory of a Party to the PACER Plus that satisfy the new rules of origin contained in new Division 1GA of Part VIII of the Act, inserted by the PACER Plus Implementation Act.

Paragraph 5 of Article 18 of Chapter 3 of the PACER Plus sets out provisions that apply where an importer may apply for preferential tariff treatment in relation to goods but does not make such a claim at the time of importation. A refund of any excess duties paid in relation to the goods is payable in this circumstance, provided that:

- the goods would have qualified for preferential tariff treatment when imported into the territory of the Party; and
- the application is made within two years of the date of importation or such longer period as the importing Party's laws and regulations allow.

The purpose of the *Customs (International Obligations) Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Regulations 2018* (the Amendment Regulations) is to amend the *Customs (International Obligations) Regulation 2015* to prescribe two new refund circumstances in respect of goods imported into Australia from a Party to the PACER Plus, in order to fulfil above-mentioned obligation, as follows:

- for Pacific Islands originating goods, the refund circumstance applies when customs duty has been paid on such goods; and
- for goods that would have been Pacific Islands originating goods if, at the time the goods were imported, the importer held a ‘Declaration of Origin’ or a copy of that document for the goods, the refund circumstance applies when customs duty has been paid on such goods and the importer holds a ‘Declaration of Origin’ or a copy of that document for the goods at the time of making the application for the refund.

The expression ‘Declaration of Origin’ is defined in new subsection 153ZKL(1) of the Act, which means a declaration that is in force and that complies with the requirements of Article 15 of Chapter 3 of the PACER Plus.

Details of the Amendment Regulations are set out in Attachment A. A Statement of Compatibility with Human Rights has been prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is at Attachment B.

A separate *Customs (Pacific Islands Rules of Origin) Regulations 2018* is made to prescribe matters relating to the rules of origin that will be required to be prescribed under the Act as amended by the PACER Plus Implementation Act.

Government Departments conducted extensive public and targeted stakeholder consultations during the negotiations of the PACER Plus. The consultation process encompassed all matters set out in the Amendment Regulations. Details of these consultations were set out in the consultation attachment to the National Interest Analysis of the PACER Plus.

The Joint Standing Committee on Treaties also conducted an enquiry on the PACER Plus. The enquiry included written submissions and public hearings that resulted in a report recommending binding treaty action be taken.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Regulations commence in accordance with section 2 of the Amendment Regulations. That is, sections 1 to 4 of the Amendment Regulations commence on the day after the Regulations are registered on the Federal Register of Legislation. Schedule 1 to the Amendment Regulations commences at the same time as Schedule 1 to the PACER Plus Implementation Act, which is the later of the day after that Act receives the Royal Assent, and the day the PACER Plus enters into force for Australia.

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Details of the *Customs (International Obligations) Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Regulations 2018*

Section 1 Name

This section provides that the name of the instrument is the *Customs (International Obligations) Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Regulations 2018* (the Amendment Regulations).

Section 2 Commencement

This section sets out, in a table, the date on which each of the provisions contained in the Amendment Regulations commence.

Table item 1 provides that sections 1 to 4 of the Amendment Regulations and anything in the Amendment Regulations not elsewhere covered by the table commence on the day after the Amendment Regulations are registered on the Federal Register of Legislation.

Table item 2 provides that Schedule 1 to the Amendment Regulations commences at the same time as Schedule 1 to the *Customs Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Act 2018* (the PACER Plus Implementation Act) commences.

Schedule 1 to the PACER Plus Implementation Act will commence on the later of the day on which that Act receives the Royal Assent, and the day on which the PACER Plus done at Nuku'alofa, Tonga on 14 June 2017 enters into force for Australia.

Section 3 Authority

This section sets out the authority under which the Amendment Regulations is made, which is the *Customs Act 1901* (the Act).

Section 4 Schedules

This section is the formal enabling provision for the Schedule to the Amendment Regulations, and provides that each instrument that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in the Schedule has effect according to its terms.

Schedule 1—Amendments

Customs (International Obligations) Regulation 2015

Item 1 Section 4 (before paragraph (a) of the definition of *Declaration of Origin*)

This item amends the definition of ‘Declaration of Origin’ under section 4 of the *Customs (International Obligations) Regulation 2015* (the International Obligations Regulation) to insert new paragraph (aa).

The definition of ‘Declaration of Origin’ is referred to throughout the International Obligations Regulation to identify the document that is required in relation to a claim for preferential rate of customs duty in accordance with certain Free Trade Agreements.

The new paragraph (aa) will result in the definition of ‘Declaration of Origin’, in relation to Pacific Islands originating goods, to have the meaning given by subsection 153ZKL(1) of the Act. That is, a declaration that is in force and that complies with the requirements of Article 15 of Chapter 3 of the PACER Plus.

The purpose of this amendment is to identify ‘Pacific Islands originating goods’ as goods that will require a Declaration of Origin. The definition of ‘Pacific Islands originating goods’ is inserted by item 2 of the Amendment Regulations.

Item 2 Section 4

This item amends section 4 of the International Obligations Regulation to insert the definition of ‘Pacific Islands originating goods’, which has the meaning given by subsection 153ZKL(1) of the Act.

Under subsection 153ZKL(1) of the Act, ‘Pacific Islands originating goods’ mean goods that, under Division 1GA of Part VIII of the Act, are Pacific Islands originating goods. These include goods that are:

- wholly obtained or produced in a Party to the PACER Plus; or
- produced from originating materials in a Party to the PACER Plus; or
- produced from non-originating materials in a Party to the PACER Plus, and where such goods satisfy associated requirements under Subdivision D of new Division 1GA.

The amendment made by this item is for the purposes of the new refund circumstances for Pacific Islands originating goods, or goods that would be Pacific Islands originating goods. The new circumstances are inserted by item 3 of the Amendment Regulations.

Item 3 Section 23 (after table item 8)

This item amends the table under section 23 of the International Obligations Regulation to insert new table items 8A and 8B.

The PACER Plus Implementation Act amends the Act to fulfil Australia’s obligations under Chapter 3 of the PACER Plus, which deals with rules of origin. These rules determine whether goods imported into Australia from a Party to the PACER Plus are ‘Pacific Islands originating goods’ and are thereby eligible for preferential rates of customs duty. ‘Pacific Islands originating goods’ are goods imported from the territory of a Party to the PACER Plus that satisfy the new rules of origin which are contained in new Division 1GA of Part VIII of the Act.

Paragraph 5 of Article 18 of Chapter 3 of the PACER Plus sets out provisions that apply where an importer may apply for preferential tariff treatment in relation to goods but does not make such a claim at the time of importation. A refund of any excess duties paid in relation to the goods is payable in this circumstance, provided that:

- the goods would have qualified for preferential tariff treatment when imported into the territory of the Party; and
- the application is made within two years of the date of importation or such longer period as the importing Party's laws and regulations allow.

Paragraph 5 of Article 18 is given effect under new table items 8A and 8B.

Under new table item 8A, the refund circumstance that applies to Pacific Islands originating goods is when customs duty has been paid on such goods.

Under new table item 8B, the refund circumstance that applies to goods that would have been Pacific Islands originating goods if, at the time the goods were imported, the importer held a Declaration of Origin or a copy of that document for the goods is when customs duty has been paid on such goods and the importer holds a Declaration of Origin or a copy of that document for the goods at the time of making the application for the refund.

In respect of the timeframes in which an application for refund must be made for goods, including goods that are either Pacific Islands originating goods or goods that would have been such goods, section 28 of the International Obligations Regulation limits applications for refund to be within four years after the day on which customs duty was paid.

This timeframe is consistent with paragraph 5 of Article 18 of Chapter 3 of the PACER Plus.

Item 4 After paragraph 24(d)

This item amends section 24 of the International Obligations Regulation to insert new paragraph 24(da).

Under section 24 of the International Obligations Regulation, a refund is not payable under item 6 of the table in clause 1 of Schedule 6 to the *Customs Regulation 2015* (the Customs Regulation) to the extent that an application for a refund relates to factors that determine whether goods are eligible goods covered by a Free Trade Agreements. Item 6 of the table in clause 1 of Schedule 6 deals with refund of customs duty paid due to manifest error of fact or patent misconception of the law.

New paragraph 24(da) includes in section 24 a reference to the goods mentioned in new table items 8A and 8B (inserted by item 3 of the Amendment Regulations) under section 23 of the International Obligations Regulation.

Because new table items 8A and 8B enable the refund of customs duty paid on Pacific Islands originating goods and goods that would have been Pacific Islands originating goods, duties paid in error or in excess in respect of those goods will be covered by the new table items.

The effect of this amendment is that, to the extent that an application for a refund relates to factors that determine whether goods are Pacific Islands originating goods, the refund of duty paid on Pacific Islands originating goods and goods that would have been such goods will be dealt with by new table items 8A and 8B under section 23 of the International Obligations Regulations.

Items 5 to 7

These items amend the definition of ‘duty payable’ and ‘relevant originating goods’ under subsection 31(2) of the International Obligations Regulation.

Section 31 of the International Obligations Regulation sets out the formula for which the refund, rebate or remission of customs duty is to be calculated. That is, the amount of duties paid on the goods reduced by the ‘duty payable’.

Under subsection 31(2) of the International Obligation Regulation, the expression ‘duty payable’ is defined to mean either:

- the amount of duty payable on the goods as relevant originating goods (paragraph (a) of the definition of ‘duty payable’ refers); or
- the amount of duty payable on the goods as if they had been relevant originating goods at the time of their importation (paragraph (b) of the definition of ‘duty payable’ refers).

The expression ‘relevant originating goods’ is defined to include those eligible goods that are covered by a Free Trade Agreement, i.e. Singaporean originating goods, Thai originating goods, and Chilean originating goods, etc.

To facilitate giving effect to the obligation under paragraph 5 of Article 18 of Chapter 3 of the PACER Plus (see above the notes for item 3 of the Amendment Regulations), the above-mentioned definitions are amended as follows.

Item 5 amends paragraph (a) of the definition of ‘duty payable’ under subsection 31(2) of the International Obligations Regulation to insert a reference to new table item 8A under section 23 of the International Obligations Regulation (inserted by item 3 of the Amendment Regulations).

Item 6 amends paragraph (b) of the definition of ‘duty payable’ under subsection 31(2) of the International Obligations Regulation to insert a reference to new table item 8B under section 23 of the International Obligations Regulation (inserted by item 3 of the Amendment Regulations).

Item 7 amends the definition of ‘relevant originating goods’ to insert new paragraph (da) to refer to Pacific Islands originating goods.

Collectively, the amendments enable the calculation of the amount of refund of duties paid in excess on goods that are Pacific Islands originating goods or goods that would have been such goods.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Customs (International Obligations) Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Regulations 2018

The Disallowable Legislative Instrument titled the *Customs (International Obligations) Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Regulations 2018* (the Amendment Regulations) is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Amendment Regulations

The *Customs Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Act 2018* (the PACER Plus Implementation Act) amends the *Customs Act 1901* (the Act) to fulfil Australia's obligations under Chapter 3 of the *Pacific Agreement on Closer Economic Relations Plus* (the PACER Plus), which deals with rules of origin. These rules determine whether goods imported into Australia from a Party to the PACER Plus are 'Pacific Islands originating goods' and are thereby eligible for preferential rates of customs duty. 'Pacific Islands originating goods' are goods imported from the territory of a Party to the PACER Plus that satisfy the new rules of origin contained in new Division 1GA of Part VIII of the Act, inserted by the PACER Plus Implementation Act.

Paragraph 5 of Article 18 of Chapter 3 of the PACER Plus sets out provisions that apply where an importer may apply for preferential tariff treatment in relation to goods but does not make such a claim at the time of importation. A refund of any excess duties paid in relation to the goods is payable in this circumstance, provided that:

- the goods would have qualified for preferential tariff treatment when imported into the territory of the Party; and
- the application is made within two years of the date of importation or such longer period as the importing Party's laws and regulations allow.

The purpose of the Amendment Regulations is to amend the *Customs (International Obligations) Regulation 2015* to prescribe two new refund circumstances in respect of goods imported into Australia from a Party to the PACER Plus, in order to fulfil above-mentioned obligation, as follows:

- for Pacific Islands originating goods, the refund circumstance applies when customs duty has been paid on such goods; and
- for goods that would have been Pacific Islands originating goods if, at the time the goods were imported, the importer held a Declaration of Origin or a copy of that document for the goods, the refund circumstance applies when customs duty has been paid on such goods and the importer holds a Declaration of Origin or a copy of that document for the goods at the time of making the application for the refund.

The expression ‘Declaration of Origin’ is defined in new subsection 153ZKL(1) of the Act, which means a declaration that is in force and that complies with the requirements of Article 15 of Chapter 3 of the PACER Plus.

The Amendment Regulations commences in accordance with section 2 of the Amendment Regulations. That is, sections 1 to 4 of the Amendment Regulations commence on the day after the Amendment Regulations are registered on the Federal Register of Legislation. Schedule 1 to the Amendment Regulations commence at the same time as Schedule 1 to the PACER Plus Implementation Act, which is the later of the day after that Act receives the Royal Assent, and the day the PACER Plus enters into force for Australia.

Human rights implications

The Amendment Regulations engage the right to not be subjected to arbitrary or unlawful interference with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

To the extent that the amendments contained in the Amendment Regulations will require an importer to hold a copy of the Declaration of Origin when applying for a refund of customs duty paid where the importer did not make a claim for preferential tariff treatment at the time of importation, provided the provided the goods concerned would have qualified for preferential tariff treatment when they were imported into the territory of Australia, the Regulation may limit the right to privacy under Article 17 of the ICCPR. Article 17(1) sets out:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

The Amendment Regulation amends the definition of ‘Declaration of Origin’ under section 4 of the *Customs (International Obligations) Regulation 2015* such that it includes the meaning given by subsection 153ZKL(1) of the new Division 1GA of Part VII of the Act, inserted by the PACER Plus Implementation Act. The definition is amended to include a declaration that is in force and that complies with the requirements of Article 15 of Chapter 3 of the PACER Plus.

Under Article 15 of Chapter 3 of the PACER Plus, a Declaration of Origin document completed by the exporter or producer or an authorised representative of the exporter or producer shall support a claim, by importers, that goods are eligible for preferential tariff treatment in accordance with the PACER Plus. The key information that must be included in a ‘Declaration of Origin’ document is detailed in Article 15, and Annex 3-A to, Chapter 3 of the PACER Plus and includes personal information.

The verification of the eligibility for preferential treatment is required under the PACER Plus and the amendments made by the Amendment Regulations are directed at the legitimate purpose of facilitating and supporting Australia’s international obligations under the PACER Plus. The collection and disclosure of personal information will only be permitted for the limited purpose of verifying a claim made by a person for preferential tariff treatment making it a reasonable and proportionate response to a legitimate purpose. As such, the collection

and disclosure of personal information in these circumstances will not constitute an unlawful or arbitrary interference with privacy.

Conclusion

The Amendment Regulations are compatible with human rights because to the extent that it may engage the right to privacy, it will not constitute an unlawful or arbitrary interference with privacy.

Senator the Hon. Linda Reynolds CSC
Assistant Minister for Home Affairs and Parliamentary Secretary to the Minister for Home Affairs